IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.3361 OF 1992.

Shri Nivrutti Vithal Patil
and others. : Petitioners.

versus

Arun Ramchandra Jagtap
and others. : Respondents.

Mrs.Shakuntala A Mudbidri for the petitioners.
Mr.S.Pathak i/by Mr.A.V.Anturkar for Respondent Nos.1 to 3.

CORAM : D.G.DESHPANDE, J.

DATED : November 06, 2006.

ORAL ORDER

1. Heard counsel for the petitioners and the respondents.

2. Petitioners are the tenants. The Respondents are the landlords under the Bombay Tenancy and Agricultural Lands Act, 1948

(hereinafter referred to as the "Tenancy Act".) Vithal Patil - the father of Petitioner No.1 filed an application under Section 37 of the Tenancy Act before the Tahsildar, Karamala. It was his contention before the Tahsildar that the landlord obtained exemption certificate under Section 88C of the Tenancy Act and took possession of the land from him on 24.9.1968 as per the order of the Deputy Collector. However, he ceased to cultivate the land personally till 12 years from the date of taking possession from the tenant as required by law and instead on 10.11.1978 he sold the land to the Respondent Nos. 2 and 3, and therefore the tenant was entitled for restoration of the land to him. The Tahsildar dismissed the application of the tenant for restoration of the land and ordered that possession should be retained with the respondent Nos. 2 and 3 - the transferees from the original landlord. The petitioners - tenants thereafter filed an appeal. By that time the original tenant Vithal Patil had expired and the appeal came to be filed by the his legal heirs, who are the petitioners before this court, vide Appeal No.30 of 1981. This appeal was also dismissed and the lower court’s order was confirmed. Then

the tenants i.e. the present petitioners filed a Revision before the Maharashtra Revenue Tribunal, Pune. The Revision also came to be dismissed. Then Review Application was filed. That was also dismissed. Hence, this petition.

3. The learned advocate for the respondent firstly contended that all the four courts below i.e. authorities vide their four judgments have given findings against the petitioners, then this petition which is under Article 227 of the Constitutional of India was not maintainable or at least it should not be allowed unless any perversity in the orders of all the courts below was shown by the petitioners.

4. As against this, the learned advocate for the petitioners contended that all the four orders of the courts below were perverse. Tahsildar in his order dated 23.7.1981 while rejecting the application of the tenant, came to a wrong conclusion that it was not obligatory upon the landlord to cultivate the land personally for a period of 12 years but what was necessary was the user of the land which is not changed during the period of 12 years. This

conclusion, according to her, is totally wrong and not contemplated by Section 13 of the Tenancy Act.

5. Further, according to her, the appellate authority as well as the MRT in all the subsequent orders wrongly came to the conclusion that the rights of the original tenant Vithal Patil were not heritable. The Authorities below have relied upon in this regard the judgment of the Supreme Court reported in the case of Vithal Dattatrya Kulkarni v/s. Shamrao Tukaram Power and others, reported in AIR 1979 SC 1121. But this judgment, according to her, is before the amendment of Tenancy Act in 1956 and, after the Amendment of Tenancy Act the situation has changed and rights of the tenants have become heritable. Therefore, according to her the petition was required to be allowed.

6. On the other hand the learned advocate for the Respondent contended that Section 88C was introduced for the purpose of protecting the lands of agriculturist so that they are not deprived of their source of livelihood where the actual income from their tenanted land was not

more than Rs.1,500/- per annum. Secondly, he contended that the landlord had cultivated the land after the possession was handed over to him, he cultivated for more than 10 years and then in 11th year he sold it to the respondent Nos. 2 and 3 and if the aim and purpose behind section 88C is seen then there is no illegality committed by the landlord. He also contended that section 37 was not applicable in the instant case. Section 40 is also not attracted and the interpretation of section 37 as made by Tahsildar was absolutely proper. Further, according to him, the reliance placed by the MRT upon the judgment of the Supreme Court, referred to above, was proper in the circumstances and the amendment does not change the situation nor it gives any more rights to the petitioners. He also stated that the possession was taken under Section 33B. In short, according to him, firstly when in all the four orders, all the authorities below have held against the petitioners, then no interference was required to be called for and secondly there was no substance in any of the submissions made by learned advocate for the petitioners.

7. He also contended that the Supreme Court in its judgment in the case of **Vithal Dattatraya Kulkarni v/s. Shamrao Tukaram Power** reported in **AIR 1979 SC 1121** held that the right of protected tenant to recover possession of land under Section 37 of the Tenancy Act is not heritable. However, Mrs.Mudbidri, the learned advocate appearing for the petitioner, contended that this might be the position prior to amendment of Tenancy Act in 1956, but after 1956 the tenancy rights have become heritable and, therefore, the judgment of the Supreme Court was of no help. She also relied upon the judgment of this Court in the case of **Sou.Nakabai v/s. Mahadu Sakharam Adsule and others** reported in **1980 Bombay 208.**

8. However, it has to be mentioned at the out set that the aforesaid judgment of this Court was in respect of statutory tenant covered under Section 88B of the Tenancy Act. Section 88B of the Tenancy Act is about "Exemption or certain provisions to land of local authorities, universities and trust". Therefore, in that judgment, the Sections, which were relevant and involved, were Sections 88B, 27, 30 and 40 of the Tenancy Act. Section 27 is about "sub-division,

sub-letting and assignment prohibited". Section 30 is about "rights and privileges of tenants not to be affected under usage or for the time being in force or arising out of any contract, grant, decree or order of a court, however, subject to the provisions of this Act". Section 40 is in respect of "continuance to tenancy on death of tenant". That is brought into force after the amendment in 1956.

9. Even if it is accepted for the sake of argument that the rights of the tenants are heritable, the question, as rightly argued by the advocate for the respondent, is whether a tenant can claim back the land under Section 37 of the Tenancy Act particularly when the landlord has got the possession by exemption certificate under Section 88C. Since the issue is important, I am reproducing Sections 88C and 37 of the Tenancy Act as under :-

> **"Section 88C :- Exemption from Certain provisions to lands leased by persons with the annual income not exceeding Rs.1,500/- --**
>
> (1) [Save as otherwise provided by sections 33-A, 33-B and 33-C, nothing in sections] 32 to 32R (both inclusive)

shall apply to lands leased by any person if such land does not exceed an economic holding and the total annual income of person including the rent of such land does not exceed Rs.1,500/- :

Provided that the provisions of this sub-section shall not apply to any person who holds such lands as a permanent tenant or who has leased such land on permanent tenancy to any other person.

[(2) Every person eligible to the exemption provided in sub-section (1) shall make an application in the prescribed form to the Mamlatdar within whose jurisdiction all or most of the pieces of land leased by him are situate within the prescribed period for a certificate that he is entitled to such exemption.

(3) On receipt of such application, the Mamlatdar shall, after giving notice to the tenant or tenants of the land, hold inquiry and decide whether the land leased by such person is exempt under sub-section (1) from the provisions of sections 32 to 32-R.

(4) If the Mamlatdar decides that the land is so exempt, he shall issue a certificate in the prescribed form to such person.

(5) The decision of the Mamlatdar under sub-section (3), subject to appeal to the Collector, shall be final]"

"Section 37. Landlord to restore possession if he fails to cultivate within one year -

(1) If after the landlord takes possession of the land after the termination of the tenancy [under section 31] [33B or section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956 he fails to use it for any of the purposes specified in

the notice given under [section 31], [33B or section 34 of this Act as it stood immediately before the commencement of the Amending Act, 1956] within one year from the date on which he took possession or ceased to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy of the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof.

(2) After the tenant has recovered possession under sub-section (1) he shall, subject to the provisions of this Act, hold such land on the same terms and conditions on which he held it at the time of his tenancy was terminated.

(3) If the landlord has failed to restore possession of the land to the tenant as provided in sub-section (1) he shall be liable to any such compensation to the tenant as may be determined by the Mamlatdar for the loss suffered by the tenant on account of eviction.

[(4) The provisions of this section shall not apply to a landlord who becomes a serving member of the armed forces; and on that account, fails to use the land, or ceased to use it, for any of the purposes specified in the notice referred to in sub-section (1) and within the period specified in the sub-section]"

10. It will be clear from the wording of Section 88C that the provisions of Sections 32 to 32-R are not to apply to the lands in which

exemption is granted. But that exemption can be granted subject to the provisions of Sections 33A; 33B and 33C. Section 33A is about "Definitions of certificated landlord and excluded tenant". Section 33B is about "special right of certificated landlord to terminate tenancy for personal cultivation". Section 33C is about "Tenant of lands mentioned in section 88C to be deemed to have purchased land and other incidental provisions". The wording of Section 37 clearly shows that there is no reference to section 88C or sections 33A; and 33C. It refers to Section 31 which provides "landlord’s right to terminate tenancy for personal cultivation and non-agricultural purpose". This provision is totally and basically different from the provisions of section 88C. Next section that is referred to in section 37 of the Tenancy Act is 33B. Section 33B is about "special right of certificated landlord to terminate tenancy for personal cultivation". Next section that is referred to in section 37 is section 34. But that section 34 is deleted by Amendment of 1961.

11. Mrs.Mudbidri, the learned advocate appearing for the petitioners, when questioned,

admitted that after obtaining certificate under Section 88C of the Tenancy Act, the landlord has, by following procedure as prescribed by Section 33B in particular, got the possession of the land from the authorities.

12. In view of this fact, it is absolutely clear that what remains to be considered is, whether the landlord has committed breach of condition put in Section 37 of the Tenancy Act. I have already reproduced Section 37 above and, what Section 37 says is, "If the landlord after taking possession ..... fails to use it for any of the purposes specified in the notice given within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date of possession." The aforesaid provision of section 37 clearly shows that the landlord had to start cultivating the land personally within one year and he has to continue the user for 12 years from the date of taking possession. The Tahsildar has concluded that even after transfer of land by the landlord after ten years of personal cultivation, there is no change of user. The purchasers are also

cultivating the land and, therefore, there is compliance to the requirements of section 37. This view has been upheld by all the courts below. However, this is a wrong interpretation of section 37 for the following reasons :-

> After obtaining certificate under section 88C, the landlord had to apply for getting back the land for bonafide cultivation personally, and
>
> Section 37 says, "if the landlord fails to use the land for any of the purposes specified in the notice given under Sections 31, 33B or 34,.."

13. Heading of Section 31 is, "Landlord's right to terminate tenancy for personal cultivation and non-agricultural purpose". The title of Section 33B is, "Special right of certificated landlord to terminate tenancy for personal cultivation." So far as section 34 is concerned, it is deleted by Amendment of 1961.

14. Now in this case nothing was pointed out to me by the landlord that he had given notice to

the tenants after obtaining certificate under section 88C. That is the notice under section 31 for personal cultivation and for non-agricultural purpose. Therefore, it has to be assumed that the landlord after obtaining certificate under section 88C gave notice under Section 33B and in that case he is bound by section 37. It has to be held that he got the land under section 88C because his annual income was less than Rs.1500/- and he got the possession under Section 33B for personal cultivation. In that eventuality, he had to cultivate the land for 12 years from the date of possession. Therefore, in this background of the matter, it has to be held that the sale deed by the landlord of the land in favour of the purchasers after 10 years is in contravention of section 37. This important legal aspect of the matter was lost sight by all the authorities below and, therefore, even though there are concurrent findings of the facts in favour of the landlord, the orders of four courts below, i.e. the Tahsildar Karmala, Sub-Divisional Officer, M.R.T. in revision and also in review, and all those findings are required to be set aside.

15. Consequently, as a result, the tenants will be entitled to get back possession of the land. As a result, the petitioners succeed and, therefore, I pass the following order :-

:ORDER:

The petition is allowed.

Rule is made absolute in terms of prayer clause (b).

The order of Tahsildar, Karmala, the order of Sub-Divisional Officer, the order of Maharashtra Revenue Tribunal in Revision and also its order in review are set aside. The application of the petitioners for restoration of land is allowed.

[D.G.DESHPANDE, J.]